SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1034

CLAY BAIN and KATHRYN M. BAIN,

Petitioners,

vs.

THE MAY DEPARTMENT STORES COMPANY, a Corporation; TRW CREDIT DATA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

	Page
Opinions and Orders Below	1
Jurisdiction	2
Federal Questions Presented	2
Federal Statutes and Rules Involved	2
Statement of Facts	3
Reasons for Allowance of Writ	6
1. The Fair Credit Reporting Act Provides Civil Remedies Against "Persons" Other Than Consumer Reporting Agencies	6
2. The Fair Credit Reporting Act Provides Civil Liability for a Willful Noncompliance	7
3. The Fair Credit Reporting Act Provides Civil Liability for Negligent Noncompliance	8
Conclusion	9

INDEX TO APPENDICES

Appendix A. Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 3, Civil No. 43142 ....App. p.	1
Appendix B. Opinion of the Court of Appeal	2
Dissenting—Potter, J.	12
Appendix C. Order of the Superior Court of the State of California	14
Appendix D. 28 USC 1257	16

TABLE OF AUTHORITIES CITED

Cases	Page
People v. Davis, 147 Cal. 346 (1905)	5
Roachin v. California, 342 U.S. 164, 72 S.Ct. 205 (1952)	5
Stevens, In re, 197 Cal. 408 (1925)	5
Statutes	
United States Code, Title 15, Chap. 41(III), Secs. 1681-1681t	4
United States Code, Title 15, Sec. 1681	2, 4, 5
United States Code, Title 15, Sec. 1681a	7
United States Code, Title 15, Sec. 1681a(b)	6
United States Code, Title 15, Sec. 1681h	6
United States Code, Title 15, Sec. 1681h(e)	6, 7, 8
United States Code, Title 15, Sec. 1681n	7, 8
United States Code, Title 15, Sec. 1681o	8
United States Code, Title 28, Sec. 1257(3)	2

IN THE

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October Term, 1974
No. .....

CLAY BAIN and KATHRYN M. BAIN,

Petitioners,

vs.

THE MAY DEPARTMENT STORES COMPANY, a Corporation; TRW CREDIT DATA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioners Clay Bain and Kathryn M. Bain and each of them, pray that a Writ of Certiorari issue to review that certain order of the Supreme Court of the State of California, made and filed on November 21, 1974, denying the petition of Clay Bain and Kathryn M. Bain for a hearing in said Supreme Court to review that certain opinion and order of the Court of Appeal of the State of California, Second Appellate District, Division Three, filed on September 26, 1974.

Opinions and Orders Below.

The copy of the order of the Supreme Court of the State of California, entered November 21, 1974, appears at Appendix A hereto. A copy of the unreported opinion of the Court of Appeal of the State of Cali-

fornia, Second Appellate District, Division Three, entered September 26, 1974 (hereinafter "Court of Appeal Opinion") appears at Appendix B hereto. A copy of the Order of the Superior Court of the State of California in and for the County of Los Angeles appears at Appendix C hereto.

Jurisdiction.

The timely petition of Clay Bain and Kathryn M. Bain for a hearing before the Supreme Court of the State of California was denied by order of such court entered on November 21, 1974.

This Petition for Certiorari was filed less than ninety days from November 21, 1974. The jurisdiction of this court is involved under Section 1257(3) of Title 28 of the United States Code.

Federal Questions Presented.

1. Does the Fair Credit Reporting Act provide civil remedies against "persons" other than consumer reporting agencies?

2. Does the Fair Credit Reporting Act provide civil liability for a "user of information" for willful noncompliance?

3. Does the Fair Credit Reporting Act provide civil liability for a "user of information" for negligent noncompliance?

Federal Statutes and Rules Involved.

This petition for certiorari involves the following federal statutes and rules, quoted verbatim at Appendix D hereto: Fair Credit Reporting Act, Title 15, U.S.C. §1681 *et seq.;* 28 U.S.C. §1257(3).

Statement of Facts.

Merchandise was purchased by the Petitioners from Defendant The May Department Stores Company (hereafter May Co.), the amount of said debt was in dispute between the Petitioners and May Co. On or about the 9th day of July, 1970, a legal action was initiated by Universal Credit Bureau by and on behalf of defendant May Co. to recover monies allegedly due on the disputed debt.

A negotiated settlement of the disputed consumer debt and the legal action that was initiated therein was agreed upon between defendant May Co., Universal Credit Bureau and the Peti ioners to this action. Payment in full satisfaction was thereupon made by Petitioners to this action, and said payment in full satisfaction thereof was accepted by defendant May Co. Said legal action was thereupon, on or about August 3, 1970, dismissed with prejudice.

Subsequent to the aforesaid payment in full satisfaction of the negotiated settlement of the disputed consumer debt and the dismissal with prejudice, Petitioners were denied credit. The reason given Petitioners for the refusal by third parties in granting credit to said Plaintiffs was based in whole, or in part, upon information furnished by the May Co. and subsequently obtained from TRW Credit Data.

TRW Credit Data subsequently advised that the following data was contained in petitioner's credit profile:

Company	Status	Date Reported
May Company	Charge-off	January, 1971

On or about June 7, 1972, TRW Credit Data advised that they, TRW Credit Data, had investigated

The May Department Stores Company charge-off and Defendant, The May Department Stores Company, advised that they had settled for an amount less than the balance allegedly owing. Said Defendant May Co., therefore elected to retain the charge-off status of the paid disputed consumer account between Petitioners and Defendant May Co. in Petitioners' consumer credit file.

The aforesaid decision by Defendant May Co., to retain the charge-off status of the paid disputed consumer debt, with knowledge that the disputed consumer debt had been paid in full to the negotiated settlement thereof, and acceptance of said payment in full satisfaction thereof by Defendant May Co., and the dismissal with prejudice of the legal action that had been initiated thereon, were stated in the Petitioners' pleadings as a willful, oppressive, unlawful and malicious act by the Defendant May Co. in violation of the Fair Credit Reporting Act, Title 15, U.S.C. §1681 *et seq.*

This action was filed in the Superior Court of the State of California in August of 1972 wherein on December 4, 1972 a demurrer to the complaint was sustained. A motion to dismiss the complaint therein was granted to Defendant May Co., on March 30, 1973 for the reason that the Plaintiffs elected not to amend the complaint.

Following dismissal of its action for failure to amend, Plaintiffs appealed to the Court of Appeal of the State of California, Second Appellate District, where consideration of the appeal was assigned to Division Three of such court. The court therein held that Title 15 of the United States Code, Chapter 41, subchapter III, Credit Reporting Agencies, Sections 1681-1681t were not applicable to the actions of a retail merchandiser nor

that plaintiffs had alleged any other actionable conduct on the part of Defendant May Co. which might support a cause of action under said title.

Thereafter, Plaintiffs filed a timely petition for hearing in the Supreme Court of the State of California, reasserting the applicability of Title 15, U.S.C. §1681 *et seq.*

On November 21, 1974, without opinion, the California Supreme Court issued its order summarily denying the Plaintiffs' petition for hearing. No inferences as to the construction of Title 15, U.S.C. §1681 *et seq.* or concerning Petitioners' remaining contentions in the petition for hearing can be drawn from the Supreme Court's denial of the petition.

> *Roachin v. California,* 342 U.S. 164, 168, 72 S.Ct. 205 (1952) ("A denial [of petition for hearing] has apparently the same significance as a denial of certiorari in this Court");
>
> *In re Stevens,* 197 Cal. 408, 423-24 (1925);
>
> *People v. Davis,* 147 Cal. 346 (1905) ("[Denial of a petition for hearing] is not to be taken as an expression of any opinion of the Court, or as the equivalent thereof, in regard to any matter of law involved in the case . . .").

No procedure exists in California Law for the filing of a petition for reconsideration of the denial of a petition for hearing by the California Supreme Court.

REASONS FOR ALLOWANCE OF WRIT.

1. The Fair Credit Reporting Act Provides Civil Remedies Against "Persons" Other Than Consumer Reporting Agencies.

The conduct of May Co. falls within the purview of §1681h of the Fair Credit Reporting Act, Title 15, U.S.C. §1681 *et seq.*

Section 1681h, subsection (e) provides the following:

> "Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, *any user of information, or any person who furnishes information to a consumer reporting agency,* based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, *except as to false information furnished with malice or willful intent to injure such consumer.*" (Emphasis supplied).

As used in Section 1681h, subsection (e), "any user of information, or any person who furnishes information" is applicable to a retail merchandiser such as May Co. It is evident from the reading of said subsection and applying the definition of "person" as provided in Section 1681a, subsection (b) which reads, "The term '"person"' means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity," that the intent of said Section 1681h, subsection (e) is to identify those who may be civilly liable for false information furnished to a consumer reporting agency.

The May Co. being a duly authorized corporation falls squarely within the purview of those "persons" identified in Section 1681a.

Further Section 1681h, subsection (e) provides civil liability for a "user of information" which furnishes false information to a consumer reporting agency. The May Co. in their retail credit functions was a user of information supplied from TRW Credit Data. As a user of information, May Co. was under a reciprocal duty not only to use information but to supplement the information contained therein as it deemed necessary to complete the consumer credit profile.

Application of Section 1681h, subdivision (e) provisions regarding false information furnished with malice or a willful intent correspondingly applies wherein said user of information obtains knowledge of the falsity of information supplied by it to the consumer reporting agency and thereupon elects to retain same in the consumer credit file.

Therefore, the clear intent of Section 1681h, subsection (e) is to provide civil remedies against those persons other than a consumer reporting agency, in an expressed effort to prevent injury to such consumers from false information furnished with malice or a willful intent to injure.

2. The Fair Credit Reporting Act Provides Civil Liability for a Willful Noncompliance.

Section 1681n provides:

> "Any consumer reporting agency or *user of information which willfully fails to comply with any requirement imposed under this subchapter* with respect to any consumer *is liable to that consumer* in an amount equal to the sum of—

(1) Any actual damages sustained by the consumer as a result of the failure;

(2) Such amount of punitive damages as the court may allow; and . . ." (Emphasis supplied).

As heretofore established, May Co. as a "user of information" would be subject to civil liability for false information furnished to a credit agency as provided above if as a user of information it willfully failed to comply with Section 1681h, subsection (e).

Therefore, the specific inclusion of the terminology "user of information" in Section 1681n was expressly intended to provide a civil remedy against a retail merchandiser such as May Co. for willful noncompliance with any subchapter herein.

3. The Fair Credit Reporting Act Provides Civil Liability for Negligent Noncompliance.

Section 1681o provides:

"Any consumer reporting agency or *user of information which is negligent in failing to comply with any requirement imposed under this subchapter* with respect to any consumer *is liable to that consumer* in an amount equal to the sum of—

(1) Any actual damages sustained by this consumer as a result of the failure; . . ." (Emphasis supplied).

Reasserting the allegation that May Co. falls within the purview of a "user of information," Section 1681o above provides civil liability for a negligent failure to comply with any subchapters herein.

Therefore, the May Co. as a retail merchandiser in negligently violating Section 1681h, subsection (e),

heretofore asserted, would be civilly liable to any consumer damaged by May Co.'s negligent failure to comply.

Conclusion.

For these reasons, a writ of certiorari should issue to review the order of the Supreme Court of the State of California entered November 21, 1974.

Respectfully submitted,

DEAN R. PIC'L,
Counsel for Petitioners.

GERALD H. MURRAY,
Of Counsel for Petitioners.

APPENDIX A.

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 3, Civil No. 43142.

Order Due November 21, 1974.

In the Supreme Court of the State of California, in Bank.

Clay Bain and Kathryn M. Bain, v. The May Department Stores Company, a Corporation; TRW Credit Data.

Filed: November 4, 1974.

Appellants' petitions for hearing denied.

WRIGHT
Chief Justice

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Clay Bain and Kathryn M. Bain, Plaintiffs and Appellants, vs. The May Department Stores Company; TRW Credit Data, Defendants and Respondents. 2d Civil No. 43142, (Superior Ct. No. EA C 14246).

Filed: Sept. 26, 1974.

APPEAL from judgment of the Superior Court of Los Angeles County. James H. Piatt, Judge. Judge affirmed as to one defendant and reversed as to other defendant.

Gerald H. Murray for Appellants.

Shield and Smith and Anthony B. Drewry for Respondent The May Department Stores Company.

Clausen and Gilliland and William N. Roberson for Respondent TRW Credit Data.

Plaintiffs filed a complaint for damages against defendants The May Department Stores Company, a retail merchandiser (hereafter May Co.), and TRW Credit Data, a consumer credit reporting company (hereafter TRW). Plaintiffs allege that on July 9, 1970, a "legal action was initiated by UNIVERSAL CREDIT BUREAU by and on behalf of . . . [May Co.] against plaintiffs to recover monies allegedly due . . . [May Co.] for consumer merchandise purchased" by plaintiffs. Plaintiffs disputed the amount claimed by May Co. and eventually a "negotiated settlement of the . . . disputed consumer debt and the legal action . . . was agreed upon between defendant . . . [May Co.], UNIVERSAL CREDIT BUREAU," and plain-

tiffs. Plaintiffs allege that "[p]ayment in full satisfaction was thereupon made by plaintiffs . . . and said payment . . . was accepted by defendant . . . [May Co.]." The legal action filed on behalf of May Co. was dismissed with prejudice.

After dismissal of the lawsuit plaintiffs were denied credit. Plaintiffs allege that "[t]he reasons given plaintiffs for the refusal by third parties in granting credit to said plaintiffs was based in whole, or in part, upon information obtained from a consumer credit reporting agency namely, the defendant . . . [TRW]."

Further allegations of plaintiffs' complaint are as follows: "Defendant TRW CREDIT DATA subsequently advised that the following data was contained in plaintiffs' credit profile:

Company	Status	Date Reported
May Company	Charge-off	January, 1971

[¶] . . . [¶] That, on or about May 25, 1972, defendants, and each of them, were advised in writing that the aforementioned 'May Company charge-off' was the same disputed consumer debt that the legal action initiated by UNIVERSAL CREDIT BUREAU by and on behalf of the defendant THE MAY DEPARTMENT STORES COMPANY. [¶] . . . [¶] Thereafter, on or about June 7, 1972, defendant TRW CREDIT DATA advised that they, TRW CREDIT DATA, had investigated the May Company charge-off and defendant, THE MAY DEPARTMENT STORES COMPANY, advised that they had settled for an amount less than the balance allegedly owing. Said defendants, and each of them, therefore elected to retain the charge-off status of the paid disputed consumer ac-

count between plaintiffs and defendant THE MAY DEPARTMENT STORES COMPANY in plaintiffs' consumer credit file."

Plaintiffs allege that that decision constituted a "wilful, oppressive, unlawful, and malicious" act on defendants' part; that defendants' acts constituted a "wilful violation of the Civil Code of the State of California, Title 1.5, Section 1756 [now Civ. Code, § 1785.7] . . ."; and that as a result they have been damaged "in the sum of $10,000" and that they are entitled to exemplary or punitive damages in an additional sum of $40,000. Plaintiffs also assert a right to attorney's fees, costs and an injunction.

Plaintiffs' second and third causes of action appear to be identical with the first cause of action except that the second alleges a willful misrepresentation of plaintiffs' "habit of payment" and the third alleges a willful misrepresentation of plaintiffs' "general credit standing." Plaintiffs' fourth cause of action alleges that defendants' acts constituted a willful violation of 15 U.S.C., chapter 41, subchapter III, pertaining to credit reporting agencies.

Defendant TRW interposed a demurrer to plaintiffs' complaint on the grounds that: (1) the first and fourth causes of action fail to state facts sufficient to constitute causes of action, (2) the second and third causes of action "are a sham and superfluous in that they merely repeat the allegations of the first alleged cause of action," (3) the first and fourth causes of action are uncertain in that it cannot be determined therefrom what items of alleged damages constitute the $10,000.00 figure . . .," and (4) the first and fourth causes of action fail to state facts sufficient to constitute a cause of action for punitive damages.

Defendant May Co. filed a separate demurrer to plaintiffs' complaint on the ground that each of the four causes of action alleged in plaintiffs' complaint fail to state facts sufficient to constitute a cause of action against May Co.

The trial court sustained the demurrers of defendants TRW and May Co. and granted plaintiffs twenty days leave to amend. Subsequently, each of the defendants filed motions to dismiss the action on the ground that plaintiffs had failed to amend within the time allowed therefor. (Code Civ. Proc., § 581, subd. 3.) The motions were granted and an "Order of Dismissal" (judgment of dismissal) pursuant to Code of Civil Procedure section 581, subdivision 3, was entered as to defendants TRW and May Co.

Plaintiffs appeal from the judgment.

Plaintiffs contend that "the refusal after formal notification by the plaintiffs to defendant . . . [TRW] and defendant . . . [May Co.], to delete the teminology 'charge-off' from plaintiffs' credit profile is a willful misrepresentation of (1) plaintiffs' ability to pay, (2) his habit of payment, and (3) his general credit standing." It is plaintiffs' position that their complaint states a cause of action for each alleged willful misrepresentation under the provisions of Civil Code section 1785.7.

The California consumer credit reporting business is regulated by the Consumer Credit Reporting Act (Civ. Code, §§ 1785.1-1785.8). The act requires credit reporting agencies to disclose upon request of a consumer "[t]he nature and substance" of all information in the agency's files concerning the consumer, the sources of the agency's information and the creditors to whom the agency has furnished information within the preceding

six-month period. (Civ. Code, § 1785.3.) With respect to a dispute as to the completeness or accuracy of the agency's records, Civil Code section 1785.6 provides as follows: "(a) If the completeness or accuracy of any item of information contained in the reporter's[1] records is disputed by the applicant,[2] and such dispute is directly conveyed to the reporter by the applicant, the reporter shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the applicant is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the reporter shall promptly delete such information. [¶] (b) If the reinvestigation does not resolve the dispute, the applicant may file a brief statement setting forth the nature of the dispute. The reporter may limit such statements to not more than 100 words if it provides the applicant with assistance in writing a clear summary of the dispute. [¶] (c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the reporter shall, in any subsequent credit rating report containing the information in question, clearly note that it is disputed by the applicant and provide either the applicant's statement or a clear and accurate codification or summary thereof. [¶] (d) Following any deletion of information which is found to be inaccurate or whose

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[1]"Reporter" is defined in Civil Code section 1785.2, subdivision (b), as "a person, partnership, or corporation which for compensation provides a customer . . . with credit information or credit rating upon an applicant."

[2]"Applicant" is defined in Civil Code section 1785.2, subdivision (a), as "a natural person who has made application to a creditor for extension of credit for personal, family or household purposes rather than as a business."

accuracy can no longer be verified or any notation as to disputed information, the reporter shall, at the request of the applicant, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subdivision (b) or (c) to any creditor specifically designated by the applicant who has within six months prior thereto received a report for credit purposes which contained the deleted or disputed information. The reporter shall disclose to the applicant his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the applicant's statement regarding the disputed information is received." Civil Code section 1785.7 provides that only a willful misrepresentation as to an applicant's ability to pay, his habit of payment or his general credit standing shall be a ground for any civil or criminal action.[3]

Plaintiffs declined to amend their complaint after the demurrers of May Co. and TRW were sustained with leave to amend. Accordingly, this court must construe the pleadings strictly and must assume that plaintiffs have pleaded as strong a case as they can. (*Sierra Investment Corp. v. County of Sacramento,* 252 Cal.App.2d 339, 341; *Cal Francisco Inv. Corp. v. Vrionis,* 14 Cal.App.3d 318, 321.)

We turn first to the general demurrer of defendant May Co. Plaintiffs' complaint relates solely to alleged willful misrepresentations of plaintiffs' ability to pay,

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[3]Civil Code section 1785.7 is in its entirety as follows: "If the credit rating report or memorandum relates only to the applicant's ability to pay, his habit of payment, and his general credit standing, or any of these subjects, any untrue allegation of fact contained in such report, except a willful misrepresentation, shall not be grounds for any civil action or criminal prosecution."

habit of payment and general credit standing said to have been made by notations carried in plaintiffs' credit profile on file with defendant TRW.

The gist of the wrong alleged by plaintiffs is the willful retention of inaccurate data in plaintiffs' credit profile. Plaintiffs' credit profile was maintained by defendant TRW. Plaintiffs do not allege any conduct on the part of May Co. showing its participation in the maintenance of plaintiffs' credit profile. Nor have plaintiffs alleged a conspiracy to defame plaintiffs whereby defendants May Co. and TRW agreed to put inaccurate information in plaintiffs' credit profile in order to adversely affect plaintiffs' credit standing and reputation. The Consumer Credit Reporting Act (Civ. Code, §§ 1785.1-1785.8), upon the provisions of which plaintiffs have attempted to found the first three causes of action of their complaint, does not relate to the actions of a retail merchandiser such as defendant May Co. In plaintiffs' fourth cause of action, they have not alleged a willful or negligent[4] failure on the part of defendant May Co. to comply with any requirement of title 15 of the United States Code, chapter 41, subchapter III, Credit Reporting Agencies, sections 1681-1681t. Nor have plaintiffs alleged any other actionable conduct on the part of May Co. which might support a cause of action. The general demurrer of defendant May Co. was properly sustained as to all four causes of action of plaintiffs' complaint.

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[4]The applicable statutes provide for the civil liability of "[a]ny consumer reporting agency or user of information" which "willfully fails" or "is negligent in failing" to comply with any requirement of title 15 of the United States Code, chapter 14, subchapter III, with respect to any consumer. (15 U.S.C. §§ 1681n, 1681o.)

Having so concluded, we turn to a consideration of the trial court's ruling sustaining the demurrer of defendant TRW. It is contended that the first cause of action fails to state facts sufficient to constitute a cause of action against TRW. Plaintiffs allege that suit was brought against them to recover a debt allegedly due to defendant May Co., the amount of which was disputed by plaintiffs. Thereafter, a negotiated settlement was agreed upon with respect to said lawsuit and payment by plaintiffs in full satisfaction of the disputed debt was accepted by May Co. Plaintiffs allege that thereafter they were denied credit by third persons who based their refusal upon information obtained from defendant TRW. TRW advised plaintiffs that their credit profile contained a "charge-off" designation with respect to their May Co. account and that it indicated the aforesaid disputed debt which had been settled by the parties. TRW then, as provided in Civil Code section 1785.6, reinvestigated the information with respect to plaintiffs' May Co. account. TRW reported that May Co. advised them that they had settled for an amount less than the balance allegedly owing. TRW decided to retain the "charge-off" status with respect to plaintiffs' account with May Co.

TRW contends that plaintiffs cannot state a cause of action under the Consumer Credit Reporting Act because they failed to follow all the procedures available to them under the act for challenging the accuracy of their credit profile. Thus, it is contended that plaintiffs failed to allege that they filed a statement of dispute as provided for in Civil Code section 1785.6, subdivision (b). However, there is no language in the Credit Consumer Reporting Act which would indicate that the filing of a "statement of dispute" is a pre-

requisite to a suit claiming civil liability for a willful misrepresentation for which provision is made in Civil Code section 1785.7. The provisions of Civil Code section 1785.6, subdivision (b), are not mandatory. Thus, it is provided that "[i]f the reinvestigation does not resolve the dispute, the applicant *may* file a brief statement setting forth the nature of the dispute." (Emphasis added.) Contrast the mandatory obligation of the credit reporting agency to make note of a statement of dispute, if filed, in any subsequent credit rating report. (Civ. Code, § 1785.6, subd.(c).)

TRW further contends that plaintiffs have failed to allege facts showing that their conduct was "willful." Plaintiffs allege that TRW "investigated the May Company charge-off and defendant, . . . [May Co.] advised that they had settled for an amount less than the balance allegedly owning." Plaintiffs allege that "with knowledge that the disputed consumer debt had been paid in full to the negotiated settlement thereof," and with knowledge that May Co. had accepted plaintiffs' payment in "full satisfaction" of the disputed debt, TRW decided to retain the inaccurate charge-off designation in plaintiffs' consumer profile. TRW argues in effect that under the circumstances the designation was not inaccurate. However, in determining the propriety of the trial court's ruling on TRW's demurrer, we must assume the truth of plaintiffs' allegations. Since plaintiffs have sufficiently pleaded that the designation was inaccurate and untruthful, it follows that TRW's retention of the designation with full knowledge of the details of the settlement of plaintiffs' account with May Co. was willful within the meaning of Civil Code section 1785.7.

Plaintiffs have alleged facts showing that TRW published a credit report to third persons which contained a misrepresentation made after TRW had investigated and had full access to all pertinent facts pertaining to the status of plaintiffs' May Co. account. Plaintiffs' first cause of action alleged a willful misrepresentation with respect to plaintiffs' "ability to pay." Their second and third causes based on exactly the same facts respectively alleged willful misrepresentations with respect to plaintiffs' "habit of payment" and plaintiffs' "general credit standing." Whether or not a willful misrepresentation had been made by defendant TRW is a question to be decided upon the trial of this action, but, as a matter of pleading, plaintiffs have alleged facts sufficient to constitute a cause of action with respect to the first, second and third causes of action of their complaint.

Plaintiffs' fourth cause of action is based on the same facts, but therein plaintiffs purport to state a cause of action under title 15 of the United States Code, sections 1681-1681t.

The federal act, although more comprehensive, is similar to the California legislation. However, while the California legislation merely provides that untrue allegations of fact contained in a credit rating report, other than a willful misrepresentation, shall not be grounds for any civil action, the federal legislation provides civil liability for both a willful and a negligent failure to comply with any requirement of the federal act. Plaintiffs do not allege specifically what requirement of the federal act TRW failed to comply with. However, from the facts pleaded, it appears that plaintiffs have alleged a willful violation of section 1681i. subdivision (a), wherein it is provided in pertinent part

as follows: "If the completeness or accuracy of any item of information contained in his file is disputed by a consumer . . . the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information. . . . If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information." As noted above, whether or not the allegations of plaintiffs' fourth cause of action are true is a matter to be decided at the trial of this action. However, as a matter of pleading, with respect to the fourth cause of action of their complaint plaintiffs have stated facts sufficient to constitute a cause of action.

As to defendant The May Department Stores Company, the judgment is affirmed. As to defendant TRW Credit Data, the judgment is reversed.

Ford, *P. J.*

I concur:

Allport, *J.*

I dissent from the decision insofar as it reverses the judgment in favor of the defendant TRW Credit Data.

Though given leave to do so, plaintiffs declined to amend after the demurrer of defendant TRW was sustained. Accordingly, plaintiffs' pleadings must be construed strictly and it must be assumed that the facts have been pleaded as strongly in favor of plaintiffs as it is possible to plead them. (See *Sierra Investment Corp. v. County of Sacramento,* 252 Cal.App.2d 339, 341; *Cal Francisco Inv. Corp. v. Vrionis,* 14 Cal. App.3d 318, 321.)

The allegations purporting to charge defendant TRW with a willful retention of inaccurate data are insufficient. There is no allegation that the "charge-off" credit designation was inaccurate. The only factual allegation bearing upon plaintiffs' claim of inaccuracy is the allegation that this designation was retained "with knowledge that the disputed consumer debt *had been paid in full to the negotiated settlement thereof,* and the acceptance of said payment in full satisfaction thereof by defendant THE MAY DEPARTMENT STORES COMPANY, and the dismissal with prejudice of the legal action that had been initiated thereon, . . ." (Emphasis added.) This allegation is not an allegation that the account was paid in full. Evidence Code section 1154 expressly provides that the acceptance of a sum of money "in satisfaction of a claim . . . is inadmissible to prove the invalidity of the claim or any part of it." The allegations of the complaint are therefore entirely consistent with the demand of May Co. having been settled not only for less than the sum claimed but in fact for less than the amount legitimately due. In the latter event the description "charge-off" would be accurate.

Under the circumstances, the allegation of the complaint that the conduct of the defendant TRW was "willful" is a mere epithet which adds nothing to the allegations of fact.

Potter, *J.*

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

APPENDIX C.

Superior Court of the State of California, for the County of Los Angeles. Dept. EA H.

Date: Dec. 4, 1972.

Honorable James H. Piatt, Judge.

S. Jones, Deputy Clerk.

Clay Bain, et al vs. The May Department Stores, Co., a Corp., et al. EA C 14246.

Counsel for Plaintiff: Gerald H. Murray.

Counsel for Defendant: Shield & Smith, Clausen, Gilliland & Fernandes.

Nature of Proceedings: ruling on submitted matter.

In the matters heretofore submitted on November 3, 1972, the court now makes the following orders:

Defendant TRW Credit Data's demurrer is sustained, twenty days to amend.

Defendant May Department Stores Company's demurrer is sustained, twenty days to amend.

Copy to all counsel of record by U.S. Mail.

Superior Court of the State of California, for the County of Los Angeles. Dept. East C.

Date: March 30, 1973.

Honorable James H. Piatt, Judge.

C. M. McNabb, Deputy Clerk.

Clay Bain & Kathryn M. Bain vs. The May Department Stores et al. EA C 14246.

Counsel for Plaintiff: Gerald H. Murray.

Counsel for Defendant: Clausen, Gilliland & Hanrahan, by A. Drewry, Shield & Smith, by T. Feeley.

Nature of Proceedings: Deft's motion to dismiss for failure to amend after sustaining demurrer.

Motion to dismiss entire action granted, pursuant to Section 581 (3) of the Code of Civil Procedure.

Moving party to give notice.

ORDER OF DISMISSAL

Name, Address, and Telephone Number
of Attorney(s) plaintiff

Gerald H. Murray
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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Clay Bain, et al Plaintiff(s) vs The May Department Stores Co., et al. Defendant(s). EAC 14246.

Good cause appearing therefor, the above entitled action is hereby dismissed under the provisions of Section 581(3) of the Code of Civil Procedure as to defendants May Department Stores Co., a Corporation, TRW Credit Data and Does One through Ten, inclusive.

It is further ordered that.....have and recover costs ..... against the ..... in the sum of $.....

DATED: March 30, 1973

/s/ James H. Piatt
Judge

APPENDIX D.

28 USC 1257.

1257. State courts — Appeal — Certiorari. —Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (June 25, 1948, c. 646, § 1, 62 Stat. 929.)

SUBCHAPTER III—
CREDIT REPORTING AGENCIES

§ 1681a. *Definitions; rules of construction*

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, associa-

tion, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or

associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

Pub.L. 90-321, Title VI, § 603, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1128.

§ 1681g. *Disclosures to consumers*

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided,* That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished—

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

(b) The requirements of subsection (a) of this section respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

Pub.L. 90-321, Title VI, § 609, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1131.

§ 1681h. *Conditions of disclosure to consumers—Times and notice*

(a) A consumer reporting agency shall make the disclosures required under section 1681g of this title during normal business hours and on reasonable notice.

Identification of consumer

(b) The disclosures required under section 1681g of this title shall be made to the consumer—

(1) in person if he appears in person and furnishes proper identification; or

(2) by telephone if he has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

Trained personnel

(c) Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 1681g of this title.

Persons accompanying consumer

(d) The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

Limitation of liability

(e) Except as provided in sections 1681n and 1681*o* of this title, no consumer may bring any action or pro-

ceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, except as to false information furnished with malice or willful intent to injure such consumer.

Pub.L. 90-321, Title VI, § 610, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1131.

§ 1681m. *Requirements on users of consumer reports —Adverse action based on reports of consumer reporting agencies*

(a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

Adverse action based on reports of persons other than consumer reporting agencies

(b) Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit

capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

Reasonable procedures to assure compliance

(c) No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subsections (a) and (b) of this section.

Pub.L. 90-321, Title VI, § 615, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1133.

§ 1681n. *Civil liability for willful noncompliance*

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) In the case of any successful action to enforce any liability under this section, the costs of

the action together with reasonable attorney's fees as determined by the court.

Pub.L. 90-321, Title VI, § 616, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.

§ 1681*o*. *Civil liability for negligent noncompliance*

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Pub.L. 90-321, Title VI, § 617, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.

SUBJECT INDEX

Page

Introduction 1

Questions Presented 2

Statement of the Case 2

1. Allegations of the Fourth Cause of Action .. 3

2. Opinion of the Court of Appeal With Regard to the Fourth Cause of Action 4

Reasons That the Cause Should Not Be Reviewed by This Court 5

1. The Court in This Instance Does Not Have Jurisdiction to Grant a Writ of Certiorari 5

   A. The Court of Appeal's Opinion Does Not Question the Validity of the Fair Credit Reporting Act 5

   B. The Judgment of Dismissal Must Be Affirmed, on Appellants' Election to Stand on Their Complaint, Where the Complaint Is Insufficient on Any Grounds Specified in Respondent's Demurrer 6

2. The Fair Credit Reporting Act Does Not Apply to Retail Merchants Such as Respondent 7

3. The Fourth Cause of Action of the Complaint Does Not Allege a Willful Failure by Respondent to Comply With Any Provision of the Fair Credit Reporting Act 9

   A. Respondent Did Not Violate Section 1681i Since That Provision Affects Only Consumer Reporting Agencies 9

Page

B. Nothing in the Fair Credit Reporting Act Requires the Deletion Upon Demand of Information in Consumer Reports 10

C. The Language of Section 1681c(a)(4) Strongly Implies That a "Charge-Off" Entry in a Consumer Report Does Not Violate Any Provision of the Fair Credit Reporting Act 10

D. Appellants' Use of Conclusionary Terms, Such as "willful, oppressive, unlawful, and malicious", Are Insufficient in Themselves to Support Any Cause of Action Under Title 15 U.S.C. Section 1681n 11

Conclusion 13

TABLE OF AUTHORITIES CITED

Cases	Page
Bernstein v. Piller, 98 Cal.App.2d 441	6, 11
Bradler v. Craig (1969) 274 Cal.App.2d 446	6
Ebaugh v. Rabkin, 22 Cal.App.3d 891	12
Everett v. California Teachers Association, 208 Cal. App.2d 291	11
Gombos v. Ashe, 158 Cal.App.2d 57	12
Jackson v. Underwriters Report, 21 Cal.App.2d 591	11
Locke v. Mitchell, 7 Cal.2d 599	11
Noonan v. Rousselot, 239 Cal.App.2d 447	11
Sierra Investment Corporation v. Sacramento County, 252 Cal.App.2d 339, 60 Cal.Rptr. 519	6
Rules	
United States Supreme Court Rules, Rule 24	1
Statutes	
California Code of Civil Procedure, Sec. 581(3)	1
Fair Credit Reporting Act, Sec. 1681a(f)	7
Fair Credit Reporting Act, Sec. 1681a(g)	3, 9
Fair Credit Reporting Act, Sec. 1681a(4)(b)	7
Fair Credit Reporting Act, Sec. 1681c(a)(4)	10, 11
Fair Credit Reporting Act, Sec. 1681b	8
Fair Credit Reporting Act, Sec. 1681i	4, 9, 10
Fair Credit Reporting Act, Sec. 1681i(a)	9
Fair Credit Reporting Act, Sec. 1681i(b)	10
Fair Credit Reporting Act, Sec. 1681i(c)	10
Fair Credit Reporting Act, Sec. 1681i(d)	10
Fair Credit Reporting Act, Sec. 1681n	3, 7, 9

Page

United States Code, Title 15, Sec. 1681 3

United States Code, Title 15, Sec. 1681i 12

United Sates Code, Title 15, Sec. 1681n 11

United States Code, Title 28, Sec. 1257(3) 5

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1034

CLAY BAIN and KATHRYN M. BAIN,

Petitioners,

vs.

THE MAY DEPARTMENT STORES COMPANY, a corporation; TRW CREDIT DATA,

Respondents.

Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Introduction.

Respondent, the May Department Stores Company, files this opposing brief under Supreme Court Rule 24 and prays that this Court deny the Petition for Writ of Certiorari to review the Order of the Supreme Court of the State of California.

Respondent had demurred to the Complaint. The general demurrer was sustained and leave was granted to amend the Complaint. Appellants elected not to amend, and on motion by Respondent the Superior Court dismissed the action pursuant to subdivision 3 of Section 581 of the California Code of Civil Procedure. A judgment was entered in favor of Respondent.

The Court of Appeal of the State of California, Second Appellate District, affirmed the judgment of the Superior Court as to this Respondent.

The Supreme Court of the State of California, in Bank denied appellants' petition for hearing.

Questions Presented.

1. Does the Supreme Court have jurisdiction to grant a writ of certiorari?

2. Does the Fair Credit Reporting Act apply to retail merchants such as Respondent?

3. Does the fourth cause of action of the Complaint allege a willful failure by Respondent to comply with any requirement of the Fair Credit Reporting Act?

Statement of the Case.

The Complaint purports to state four causes of action against Respondent. Only the fourth cause of action pertains to the Fair Credit Reporting Act. In each cause of action it is contended that the following entry on appellants' credit profile, prepared by TRW, caused appellants to be denied credit:

Company	Status	Date Reported
The May Company	Charge-off	January 1971

Only the fourth cause of action pertains to the Fair Credit Reporting Act.

Appellants purchased merchandise on credit from May Company. A dispute arose between appellants and May Company over the amount of the debt created by this purchase. In July 1970, legal action was initiated against appellants by Universal Credit Bureau on behalf of May Company to recover monies allegedly due on the disputed debt. That lawsuit was terminated by dismissal with prejudice after a negotiated settlement between appellants and Universal Credit Bureau.

Appellants contend that they were denied credit after their payment of the negotiated settlement and the dismissal with prejudice. Appellants claim that they were denied credit by third parties who obtained credit information concerning appellants from TRW, a credit reporting agency. Appellants further allege that the "inaccuracy" of the "charge-off" entry was brought to May Company's attention; that May Company advised TRW that May Company had settled the legal action for an amount less than the balance allegedly owing; and that May Company "willfully misrepresented" the status of appellants' credit standing by refusing to request that TRW delete the "charge-off" entry from its credit profile.

1. Allegations of the Fourth Cause of Action.

The fourth cause of action states that the alleged conduct of May Company falls within the purview of §1681n of the Fair Credit Reporting Act. Title 15, U.S.C. §1681 *et seq.*

Section 1681n provides the following:

> "Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> (1) Any actual damages sustained by the consumer as a result of the failure;
>
> (2) Such amount of punitive damages as the court may allow; and . . ."

A further reading of the fourth cause of action shows that appellants contend that Respondent failed to delete the "charge-off" entry from TRW's "file" (see 1681a(g) for definition) and thus "willfully failed" to

comply with §1681i of the Act, which provides in part as follows:

"(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the *consumer reporting agency* by the consumer, the *consumer reporting agency* shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the *consumer reporting agency* shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant." (Emphasis supplied).

2. Opinion of the Court of Appeal With Regard to the Fourth Cause of Action.

The following is the Court of Appeal's succinct holding:

"In plaintiffs' fourth cause of action, they have not alleged a willful or negligent' failure on the part of defendant May Co. to comply with any requirement of title 15 of the United States Code, chapter 41, subchapter III, Credit Reporting Agencies, sections 1681-1681t. Nor have plaintiffs al-

leged any other actionable conduct on the part of May Co. which might support a cause of action. The general demurrer of defendant May Co. was properly sustained as to all four causes of action of plaintiffs' complaint."

Footnote number 4, referred to in the paragraph above, states the following:

"'The applicable statutes provide for the civil liability of '[a]ny consumer reporting agency or user of information' which 'willfully fails' or 'is negligent in failing' to comply with any requirement of Title 15 of the United States Code, chapter 14, subchapter III, with respect to any consumer. (15 U.S.C. §§ 1681n, 1681o.)"

REASONS THAT THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

1. The Court in This Instance Does Not Have Jurisdiction to Grant a Writ of Certiorari.

A. The Court of Appeal's Opinion Does Not Question the Validity of the Fair Credit Reporting Act.

Title 28, U.S.C. § 1257(3) provides, in essence, that the United States Supreme Court may review a decree of the California Supreme Court by writ of certiorari where certain specific circumstances are present. None of those circumstances are present in the instant case. Specifically, the validity of the Fair Credit Reporting Act has not been drawn in question. Therefore, this Court does not have jurisdiction to grant such a writ.

B. The Judgment of Dismissal Must Be Affirmed, on Appellants' Election to Stand on Their Complaint, Where the Complaint Is Insufficient on Any Grounds Specified in Respondent's Demurrer.

In the Superior Court action the appellants elected to stand on their pleadings and not to amend following the Order sustaining Respondent's general and special demurrers.

Since appellants elected not to amend, a strict construction of their pleadings is required. In addition, it must be assumed that appellants pleaded as strong a case as they could.

> *Bradler v. Craig* (1969) 274 Cal.App.2d 446, 470.

The court in *Sierra Investment Corporation v. Sacramento County*, 252 Cal.App.2d 339, at page 347, 60 Cal.Rptr. 519, stated as follows:

> "It is almost axiomatic that under the circumstances the judgment of dismissal must be affirmed if the Complaint is objectionable upon any grounds raised by the demurrer (case cited). Consequently, this court does not have the power to reverse the trial court by setting aside a proper judgment of dismissal in order to give appellant the opportunity to amend its complaint at this stage of the proceeding. . . ."

The court in *Bernstein v. Piller*, 98 Cal.App.2d 441, at page 443, stated as follows:

> "On appeal from a judgment entered after the sustaining of a demurrer the order of the trial court if in general terms must be affirmed by the appellate court if the demurrer is well taken as to any of the grounds stated therein."

2. The Fair Credit Reporting Act Does Not Apply to Retail Merchants Such as Respondent.

The heading for subchapter III of the Fair Credit Reporting Act reads as follows: "CREDIT REPORTING AGENCIES". Therefore, the subchapter heading itself strongly suggests that the Act is directed towards credit reporting agencies such as TRW and not towards retail merchants such as May Company.

> "It is the purpose of this subchapter to require that *consumer reporting agencies* adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter." § 1681a(4)(b) (Emphasis supplied).

The term "consumer reporting agency", as defined in § 1681a(f) and used constantly throughout subchapter III, does not apply to retail merchants such as May Company. The term does refer to the following:

> "Any person which . . . regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

Since Respondent is not a consumer reporting agency, it must be determined that Respondent is a "user of information" in order to be affected by § 1681n of the Act. Respondent submits that it is not a "user of in-

formation". Rather, a "user" is the person to whom a consumer reporting agency provides information.

According to § 1681b of the Act, a consumer reporting agency may furnish a consumer report under the following circumstances and no other:

. . .

(3) "To a person which it has reason to believe—

(A) Intends to *use* the information in connection with a credit transaction involving the consumer on whom the information is to be furnished. . . .

(B) Intends to *use* the information for employment purposes; or

(C) Intends to *use* the information in connection with the underwriting of insurance involving the consumer; or

(D) Intends to *use* the information in connection with a determination of the consumer's eligibility for a license. . . .

(E) Otherwise has a *legitimate business need* for the information in connection with a business transaction involving the consumer." (Emphasis supplied).

Under the circumstances of this case, Respondent May Company would neither "use the information" nor have a "legitimate business need" to receive the information furnished in the consumer report of TRW, a consumer reporting agency. In fact, since in this case Respondent communicated information to TRW, there certainly was no reason for Respondent to receive or use that same information.

In summary, Respondent is neither a consumer reporting agency nor a user of information. Therefore, Respondent is not affected by the provisions of § 1681n.

3. The Fourth Cause of Action of the Complaint Does Not Allege a Willful Failure by Respondent to Comply With Any Provision of the Fair Credit Reporting Act.

A. Respondent Did Not Violate Section 1681i Since That Provision Affects Only Consumer Reporting Agencies.

A reading of the fourth cause of action shows that appellants contend that Respondent failed to delete the "charge-off" entry from TRW's "file" and thereby "willfully failed" to comply with § 1681i of the Act. Section 1681i refers to the procedure to be followed in the case of the disputed accuracy of information contained in the "file" of a *consumer reporting agency*. Respondent submits that this provision imposes no duties upon retail merchants such as May Company.

Section 1681i(a) imposes two duties upon credit reporting agencies. (1) ". . . the consumer reporting agency shall . . . reinvestigate and record the current status of that information . . .; (2) the consumer reporting agency shall promptly delete such information [if after reinvestigation such information is found to be inaccurate or can no longer be verified]".

It is noted that § 1681i(a) refers only to information contained in the consumer reporting agency's "file". Section 1681a(g) defines the term "file" as follows: "When used in connection with information on any consumer, [file] means all of the information on that

consumer recorded and retained by a consumer reporting agency regardless of how the information is stored."

It is also noted that §§ 1681i(b), (c), and (d) impose further duties upon the consumer credit agency and no duties upon retail merchants such as May Company.

B. Nothing in the Fair Credit Reporting Act Requires the Deletion Upon Demand of Information in Consumer Reports.

Section 1681i requires that the consumer reporting agency, after reinvestigation, promptly delete information *found to be inaccurate or unverifiable.* The Complaint contains no allegations that the consumer reporting agency, TRW, found the "charge-off" entry to be inaccurate or unverifiable. Therefore, there was no violation, willful or unwillful, of § 1681i. Of course, even if the Complaint did contain such factual allegations, only TRW, the credit reporting agency, and not May Company, the retail merchant, would be under the duty to delete the "charge-off" entry from the consumer report.

C. The Language of Section 1681c(a)(4) Strongly Implies That a "Charge-Off" Entry in a Consumer Report Does Not Violate Any Provision of the Fair Credit Reporting Act.

(a) "Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

> (4) Accounts placed for collection or charged to profit and loss which *antedate the report by more than seven years.*" § 1681c(a)(4).

According to the above quoted provision, *accounts* placed for collection or *charged to profit and loss* which do not antedate the consumer report by more than seven years are proper entries in consumer reports. Therefore, the "charge-off" entry in the consumer report was proper.

D. Appellants' Use of Conclusionary Terms, Such as "willful, oppressive, unlawful, and malicious", Are Insufficient in Themselves to Support Any Cause of Action Under Title 15 U.S.C. Section 1681n.

The general rule condemns as legal conclusions general allegations to the effect that acts were done maliciously, willfully, and oppressively, in the absence of specific facts pleaded. See *Locke v. Mitchell,* 7 Cal. 2d 599; *Jackson v. Underwriters Report,* 21 Cal.App. 2d 591; *Everett v. California Teachers Association,* 208 Cal.App.2d 291; *Noonan v. Rousselot,* 239 Cal. App.2d 447.

The Complaint herein merely characterizes Respondent's conduct "as willful, oppressive, unlawful and malicious" without stating facts sufficient to support those allegations. Every statement of fact in the Complaint must be direct and certain and not by way of surmise.

> *Bernstein v. Piller,* 98 Cal.App.2d 441, at 443 (1950).

The allegations of the Complaint with respect to the alleged malice do not constitute malice in fact as required by the cases.

Gombos v. Ashe, 158 Cal.App.2d 57.

In the recent opinion in *Ebaugh v. Rabkin,* 22 Cal. App.3d 891, at 895, the Court defined malice as follows:

> "Under general definition, malice in fact denotes ill will on the part of the defendant, or his desire to do harm for the mere satisfaction of doing it. In ultimate analysis, malice in fact is malice of evil motive."

Appellants contend that Respondent is liable merely because they dispute the status of their account and because Respondent willfully misrepresented the status of their account.

Assuming, for the moment, that the Fair Credit Reporting Act does potentially impose civil liability on this Respondent for willful misrepresentation, nothing appears in the Act to require Respondent to remove an entry from a credit rating report or consumer report *merely because demand has been made by the consumer.* The Act does *anticipate* disputes as to the accuracy or completeness of the information in a consumer's credit file and does *provide* detailed procedures to be followed in those instances. 15 U.S.C. § 1681i.

Respondent submits that appellants failed to utilize the remedies provided in the Fair Credit Reporting Act. Respondent further submits that, if it made a misrepresentation of the status of appellants' account, there are no facts in the court record even hinting that the alleged misrepresentation was "willful".

Conclusion.

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

By RICHARD F. RUNKLE,

Attorneys for Defendant and Respondent The May Department Stores Company.

Of Counsel:
SHIELD & SMITH,
ANTHONY B. DREWRY.